## NYO NYO AYE v. KEVIN SATHIASEELAN RAMAKRISHNAN & ANOR AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
IDRUS HARUN JCA
SURAYA OTHMAN JCA
STEPHEN CHUNG JCA
[APPEALS NO: W-02(NCVC)(W)-12-01-2018
& W-02(NCVC)(W)-2614-12-2017]
4 MARCH 2020

***TORT:*** *Negligence – Professional negligence – Professional negligence of solicitors – Breach of retainer – Client's suit struck off following failure to deposit security for costs – Whether solicitors informed client that suit would be struck off for failure to deposit security for costs – Whether solicitors took necessary steps to file application for extension of time for client to comply with order – Whether client's action barred by limitation – Whether there were losses suffered by client when suit was struck off – Whether client established standard of care allegedly breached by solicitors*

***LIMITATION:*** *Negligence – Cause of action – Accrual – Action by client against solicitors for professional negligence – Breach of retainer – Client's suit struck off following failure to deposit security for costs – Whether there were losses suffered by client when suit was struck off – When cause of action accrued – Whether limitation runs from date of damage or act which caused damage – Whether client's action well within six years' time limit – Whether client's action barred by limitation*

***LEGAL PROFESSION:*** *Duty of care – Negligence – Client's suit struck off following failure to deposit security for costs – Whether solicitors informed client that suit would be struck off for failure to deposit security for costs – Whether there was breach of duty of solicitors to inform and advise client on prospect of success of case – Whether solicitors took necessary steps to file application for extension of time for client to comply with order – Whether client established standard of care allegedly breached by solicitors*

The first respondent ('first defendant'), who was practicing with the second respondent ('second defendant'), had represented the appellant ('plaintiff') in a civil suit against the executor of the estate of her late husband. The plaintiff commenced legal proceedings against the executor, for a declaration that the alleged will tendered by the executor was null and void ('first suit'). However, the executor successfully applied and obtained an order for security for costs ('SFC order') against the plaintiff, requiring the latter to pay RM80,000 within 14 days from the date of receipt of the SFC order, failing which the first suit would be struck off. The second defendant filed an appeal for and on behalf of the plaintiff to appeal against the decision of the Deputy

Registrar in allowing the SFC order. Subsequent to the lodging of the appeal, the sealed SFC order was served on the second defendant on 15 May 2008 and the said period for compliance would have expired on or before 29 May 2008. The defendants filed for an application for stay of the SFC order ('encl. 22') and secured an interim stay pending the disposal of encl. 22. The SFC order was stayed from 28 May 2008 to 7 November 2008. However, at the hearing of encl. 22 on 7 November 2008, the application for stay was dismissed by the court. At this juncture, the plaintiff had only one day to comply with the SFC order as the SFC had to be paid on or before 8 November 2008. On 12 November 2008, the executor applied to strike off the first suit ('encl. 38'). On the instructions of the plaintiff, the second defendant filed a notice of appeal to the judge-in-chambers for and on behalf of the plaintiff to appeal against the dismissal of encl. 22 ('encl. 39'). The plaintiff forwarded the SFC to the defendants on 20 November 2009 and the defendants deposited the same in court on 28 November 2008. The court dismissed encl. 18 and encl. 39 and allowed encl. 38. Following this, the first suit was struck off for non-compliance of the payments of the SFC by the plaintiff. The plaintiff commenced an action against the defendants at the High Court, premised on a breach of retainer and professional negligence for causing the first suit to be struck off. In support of her action, the plaintiff submitted that the defendants failed (i) to inform her that the first suit would be struck off if she failed to deposit the SFC; and (ii) to secure an application for an extension of time for her to comply with the SFC order. Objecting to the plaintiff's claims, the defendants argued that (i) the plaintiff's action was barred by limitation as the cause of action arose on 8 November 2008, which was the last day the SFC had to be paid; and (ii) they had advised the plaintiff and her failure to comply with the SFC order was not due to their negligence but, instead, due to her financial difficulties. The Judicial Commissioner ('JC'), in dismissing the plaintiff's claim, held that even though the plaintiff had been able to prove that the defendants were in breach of the agreement and/or were negligent, the cause of action against the defendants was barred by limitation. Hence, the present appeals by both the plaintiff and the defendants. The defendants relied on their submissions at the High Court to support their appeal and added that (i) there was no loss suffered by the plaintiff when the first suit was struck off since the plaintiff had no reasonable prospect of success in the said suit; and (ii) the plaintiff failed to establish the standard of care allegedly breached by the defendant.

**Held (allowing appellant's appeal and dismissing respondents' appeal)**
**Per Suraya Othman JCA delivering the judgment of the court:**

**(1)** The JC erred in holding that the cause of action accrued on 9 November 2008 when the application for stay of the SFC order was dismissed by the High Court. The phrase used by the Deputy Registrar in the SFC order was that the first suit 'hendaklah dibatalkan' (shall be dismissed)

if the plaintiff failed to deposit the SFC within the stipulated time. Be that as it may, there must be an application by counsel, whether written or oral, for the first suit to be dismissed for non-compliance with the SFC order. Until and unless an application is made in court, or until the Deputy Registrar/judge pronounced the first suit to be struck off, it remained alive. The first suit could not, on its own, automatically be struck off due to the non-compliance of the plaintiff with the SFC order. This was why the executor made an application in encl. 38 to have the first suit struck off. (paras 37, 40 & 41)

**(2)** The first defendant filed a number of affidavits in reply, presumably to oppose the application by the executor. Notwithstanding these oppositions, the High Court allowed the executor's application in encl. 38 to strike off the first suit. The first defendant, having opposed the striking off application, could not now argue that the striking off order was of no consequence. By his conduct in opposing the application to strike off the first suit, he had accepted that the application was necessary. The defendants obviously did not advise the plaintiff that the application to strike off was unnecessary to extinguish the first suit. Furthermore, why should the High Court strike off the first suit if it had already been struck off on 9 November 2008? The court would not make or grant a useless order. (paras 42-44)

**(3)** In negligence actions, since damage is an essential part of the cause of action, the period of limitation runs from the date of the damage and not of the act which caused the damage. The act which caused the damage was the non-compliance by the plaintiff of the SFC order *ie* the failure to pay or deposit into the court the sum of RM80,000. However, the date of the damage was only commenced when the first suit was struck off by the High Court on 24 August 2009. Therefore, the cause of action accrued on 24 August 2009 and would have expired six years from the said date, which was on 23 August 2015. Since the present suit was filed by the plaintiff on 29 April 2015, the plaintiff was well within the six years' time limit. As such, the plaintiff's claim against the defendants was not barred by limitation. (para 45)

**(4)** The first defendant had not informed the plaintiff of the consequence of the non-payment of the SFC. This was so since the first defendant, in his testimony, repeatedly said that he had never informed the plaintiff that she had one day to make the payment and the reason for this failure to inform the plaintiff was because she had known all along when she had to pay the sum ordered as SFC. There was no documentary nor independent evidence to show that the first defendant had rendered such advice to the plaintiff. It would be reasonable to expect the defendants, being professionals, to have at least issued correspondence in writing to

A the plaintiff on a matter of such great importance. After accepting the SFC payment of RM80,000 from the plaintiff on 20 November 2008, the defendants could not show that they had given notice to the plaintiff that the payment for the SFC was made late. (para 49)

B **(5)** A lawyer should not take up a weak and hopeless case to court knowing that there is no prospect of success. This is unethical. A lawyer should only bring a case to court if they feel that they have a fairly good chance of winning. If the case is weak and hopeless, with no prospect of winning, it is incumbent upon the lawyer to advise the client, and to only proceed to file a case in court, despite the advice given, upon the C instruction of the client. The advice by the lawyer should be in writing and the instruction to proceed by the client too, despite the advice given that the case is weak and hopeless, should also be in writing. Otherwise, as in this instant case, after being sued for professional negligence, it is absurd to turn the table against the client by arguing that the case was D weak and hopeless with no chance of winning. In such circumstances, the question that begged to be answered is, did the lawyer in the first place advice the client on the prospect of the case, and if he did, was the advice ignored? Without any evidence that such an advice was proffered, the reasonable inference would be that the lawyer in putting up such a defence is trying to save himself from a professional negligent E suit which was of his own making in the first place. (para 54)

**(6)** The present case pertained to the duty of a practitioner to inform and advise the client of the consequence of non-payment of the SFC which would result in the case being struck off. It involved the duty of the F practitioner to be diligent, to ask for an extension of time if time had expired and, foremost, to inform the client on the prospect of success of the client's case and not lead the client on and, when the case gets struck off, to turn the table against the client by alleging that the case had no prospect or chances of winning after all. The defendants were negligent and in breach of their retainer. (para 64)

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**Case(s) referred to:**

*Arthur JS Hall & Co (a firm) v. Simons; Barratt v. Ansell (trading as Woolf Seddon (a firm)); Harris v. Scholfield Roberts & Hill (a firm) [2000] 3 All ER 673* ***(refd)***

*Muhamad Solleh Saarani & Anor v. Norruhadi Omar & Ors [2010] 1 LNS 370 HC* ***(refd)***

H *Noorianti Zainol Abidin & Ors v. Tang Lei Nge [1990] 1 CLJ 943; [1990] 2 CLJ (Rep) 545 HC* ***(refd)***

*Pang Yeow Chow v. Advance Specialist Treatment Engineering Sdn Bhd [2014] 8 CLJ 188 CA* ***(refd)***

*Pitt And Another v. Holt And Another; Futter And Another v. Futter And Others [2013] 3 All ER 429* ***(refd)***

I *Shearn Delamore & Co v. Sadacharamani Govindasamy [2017] 2 CLJ 665 CA* ***(refd)***

*Tetuan Theselim Mohd Sahal & Co & Ors v. Tan Boon Huat & Anor [2017] 6 CLJ 368 CA* ***(refd)***

*The Great Eastern Life Assurance Co Ltd v. Indra Janardhana Menon [2005] 4 CLJ 717 FC* ***(refd)***

**Legislation referred to:**
Limitation Act 1953, s. 6(1)(a)

*For the appellant - T Gunaseelan, Abd Razak Hashim & Ahmad Muslim Rozlan; M/s Sri Ling & Assocs*
*For the respondents - Tan Keng Teck & Janet Tang Yii Chi; M/s Lim Kian Leong & Co*

*Reported by Najib Tamby*

## JUDGMENT

**Suraya Othman JCA:**

**Introduction**

**[1]** There are two appeals before us which are as follows:

(i) W-02(NCVC)(W)-2614-12/2017 (Appeal No 2614); and

(ii) W-02(NCVC)(W)-12-01/2018 (Appeal No 12).

**[2]** These two appeals arise from the decision of the learned Judicial Commissioner (learned JC), delivered on 29 November 2017 which dismissed the plaintiff's claim against the defendants. The plaintiff, Mrs Nyo Nyo Aye, had brought this present suit against the defendants for breach of agreement (retainer) and/or professional negligence in the defendants' conduct of the Kuala Lumpur High Court Civil Suit No. S3-22-890-2007 (the first suit). The plaintiff had alleged that the defendants, as her solicitors, had failed to inform and advise her and take the necessary actions which resulted in the first suit being struck off by the High Court on 24 August 2009. At the end of the trial of this present suit, the learned JC found the defendants, as solicitors, were in breach of agreement (retainer) and/or professionally negligent but however dismissed the plaintiff's claim on the basis that her claim was time-barred.

**[3]** Both the plaintiff and the defendants were aggrieved with the decision of the learned JC and each filed separate appeals contending that the learned JC was plainly wrong in arriving at the said decision. Appeal No 2614 is the appeal by the defendants (Kevin Sathiaseelan a/l Ramakrishnan - first defendant and Messrs Syed Alwi Ng & Co - second defendant) against the decision of the learned JC which held that the defendants as solicitors were in breach of agreement (retainer) and/or professionally negligent in their duty as the plaintiff's solicitor in the first suit while Appeal No 12 is the appeal by the plaintiff (Mrs Nyo Nyo Aye) against the decision of the learned JC which held that her claim against the defendants is time barred.

**[4]** On the hearing date, by consent of both parties, the defendants Appeal No 2614 was withdrawn on the agreement that the issues which were raised in Appeal No 2614 can also be raised in Appeal No 12 and that the plaintiff

will not raise any objection if there is any need to file a leave application or an appeal proper to the Federal Court. On that agreement by parties, we struck out Appeal 2614 and proceeded to hear Appeal No 12.

**[5]** We then proceeded to hear the appeal, and after taking into consideration the submissions of parties, both oral and written, we were unanimous in our view that there were merits in the plaintiff's appeal. We therefore allowed the plaintiff's appeal and set aside the decision of the learned JC on the issue of limitation. However, we are unanimous that there is no merit in the defendants' appeal. We therefore dismissed the defendants' appeal and we affirmed the decision of the learned JC on the issue of the breach of agreement (retainer) and negligence. We then remitted the case to the High Court for assessment of damages. We now provide the reasons for our decision which will constitute the judgment of the court and for ease of reference, parties will be referred to as they were in the High Court.

**Brief Facts**

**[6]** The facts of the case can be gleaned from the submissions of counsel and we reproduced here with some modification. The plaintiff's late husband Adamberage Ananda Rex De Alwis a/l Edward De Alwis passed away on 1 March 2006.

**[7]** The plaintiff had appointed the second defendant as her solicitors to initiate a civil suit against A Maurice De Alwis, the executor of the estate of the plaintiff's late husband ("the executor").

**[8]** The first defendant was practicing with the second defendant and was the solicitor who received instructions and represented the plaintiff in the probate matter.

**[9]** The plaintiff had retained the defendants to set aside the grant of probate which was issued to A Maurice De Alwis ("the executor"), the brother of her late husband ("Adamberage Ananda Rex De Alwis"). The plaintiff's late husband had purportedly left a will, which the plaintiff claimed was forged. The defendants were engaged to set aside the grant of probate and challenge the validity of the said will.

**[10]** On 27 June 2006, on the instructions of the plaintiff, the second defendant filed a caveat with the High Court to prevent any grant of probate to be issued without notice to the plaintiff. Notwithstanding the aforesaid caveat, the High Court issued a grant of probate on 19 July 2006.

**[11]** The plaintiff then commenced legal proceedings against the executor on 6 August 2007 *vide* Civil Suit No. S3-22-890-2007 ("the first suit"), praying for a declaration that the alleged will tendered by the executor to obtain the grant of probate of the estate of the plaintiff's late husband is null and void on the ground that it was forged.

**[12]** On 28 March 2008, the executor successfully applied and obtained an order for security for costs ("SFC order") against the plaintiff requiring the plaintiff to pay RM80,000 within 14 days from the date of receipt of the SFC order, failing which, the first suit would be struck off.

**[13]** On 11 April 2008, by a notice of appeal to the judge in chambers, the second defendant filed an appeal for and on behalf of the plaintiff to appeal against the decision of the Deputy Registrar in allowing the SFC order ("encl. 18").

**[14]** Subsequent to the lodging of the above appeal, the sealed SFC order was served on the second defendant on 15 May 2008 and the said period for compliance would have expired on or before 29 May 2008.

**[15]** On 23 May 2008, the defendants filed an application for stay of the SFC order ("encl. 22") and on 28 May 2008, the defendants secured an interim stay pending the disposal of encl. 22.

**[16]** From 28 May 2008 to 7 November 2008, the SFC order was stayed pursuant to the interim stay order. At the hearing of encl. 22 on 7 November 2008, the application for stay was dismissed by the court.

**[17]** At this juncture, the plaintiff had only one day to comply with the SFC order, wherein the security for costs ("SFC") had to be paid on or before 8 November 2008.

**[18]** On 12 November 2008, by a summons in chambers, the executor filed an application to strike off the first suit ("encl. 38").

**[19]** On 14 November 2008, on the instructions of the plaintiff, the second defendant filed a notice of appeal to the judge in chambers for and on behalf of the plaintiff to appeal against the dismissal of encl. 22 ("encl. 39").

**[20]** The plaintiff forwarded the SFC of RM80,000 to the defendants on 20 November 2008. The defendants thereafter deposited the SFC in court on 28 November 2008.

**[21]** On 24 August 2009, the court dismissed encl. 18 and encl. 39, and allowed encl. 38. In allowing encl. 38, Civil Suit No. S3-22-890-2007 (the first suit) brought by the plaintiff against the executor for a declaration that the alleged will tendered by the executor to obtain the grant of probate of the estate of the plaintiff's late husband is null and void on the basis that it was forged was struck off. The first suit was struck off for non-compliance of the payment of the SFC by the plaintiff.

**[22]** Arising from the above facts, the plaintiff initiated this present suit against the defendants premised on the breach of the agreement (retainer) and professional negligence for causing the first Civil Suit No. S3-22-890-2007 (the first suit) to be struck off.

**[23]** After a full trial, the learned JC dismissed the plaintiff's claim against the defendants on the ground that the plaintiff's claim was barred by limitation.

**At The High Court**

**[24]** The main issues before the learned JC are as follows:

(i) Whether the cause of action by the plaintiff against the defendants accrued on 24 August 2009, which is when the first suit was struck off by the court on the application (encl. 38) by the executor or on 8 November 2008 which was the last date for the plaintiff to pay the SFC.

(ii) Whether the defendants were negligent and/or in breach of the retainer (agreement) when the plaintiff's first suit *via* Suit No. S3-22-890-2007 was struck off by the court due to failure to deposit SFC in the sum of RM80,000 within the time stipulated.

**Limitation**

**[25]** The defendants in the High Court pleaded the defence of limitation. They argued that the cause of action arose on 8 November 2008 which is on the last day the SFC had to be paid. The plaintiff responded by submitting that the cause of action arose on 24 August 2009 which is the date that the first suit was struck off on the application (encl. 38) by the executor.

**Breach Of Agreement (Retainer) And Negligence**

**[26]** The plaintiff argued that the defendants were in breach of the agreement (retainer) and negligent in failing to inform and advise her that the first suit would be struck off if she failed to deposit the SFC. Further, the defendants were negligent in failing to secure an application for an extension of time for her to comply with the SFC order. The defendants responded by arguing that they had advised the plaintiff and that the plaintiff's failure to comply with the SFC order was not due to their negligence but instead due to the financial difficulties faced by the plaintiff.

**[27]** On 11 October 2016, the learned JC held that notwithstanding that the plaintiff had been able to prove that the defendants were in breach of agreement (retainer) and/or were negligent, the plaintiff's cause of action against the defendants was barred by limitation. The learned JC then dismissed the plaintiff's claim against the defendants.

**Our Decision**

**[28]** The plaintiff's claim against the defendants was premised on the cause of actions for breach of the retainer agreement and professional negligence. The learned JC dismissed the plaintiff's claim on the basis that it was time-

barred. On the issue of limitation, the question was whether the plaintiff's cause of action had accrued on 24 August 2009, which is when the first suit was struck off by the court or on 8 November 2008 which was the last date for the plaintiff to pay the SFC.

**[29]** Upon perusal of the grounds of judgment (GOJ), the decision by the learned JC on the issue of limitation can be found at paras. [35], [36], [37] and [38] as follows:

> [35] Looking at the terms of the Order for SFC which *inter alia* states that a failure to deposit the sum of RM80,000 in Court within the stipulated period would result in the Civil Suit being struck off, I am of the view that the plaintiff's claim which was filed only on 29.4.2015, clearly exceeded the stipulated 6 year period.
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> [36] I am also of the view that the plaintiff cannot utilise the date of 24 August 2009 as the date the cause of action accrued as the act of negligence and/or breach of retainer complained of had accrued much earlier. Even without the defendants in the Civil Suit filing encl. 38 to strike off the said Civil Suit, by virtue of the non-compliance with Order for SFC and the dismissal of the plaintiff's application for stay on 8 November 2008, the Civil Suit would have been automatically struck off.
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> [37] In this regard, I am in agreement with the defendants' reliance on the Court of Appeal case of *Shaik Ali v. Shaik Mohamed* (1963) 29 MLJ 386 and *Pang Yeow Chow (practicing at Messrs YC Pang, Chong & Gordon) Advance Specialist Treatment Engineering Sdn Bhd* [2015] 1 MLJ 490. A review of these cases shows that in a case wherein a particular suit was struck out on account of the negligence of a solicitor, the cause of action to sue for loss of chance will commence instantaneously and after the appeal against the striking out is dismissed.
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> [38] In the above premise, notwithstanding the plaintiff being able to prove that the defendants were in breach of agreement (retainer) and/or negligent, I am constraint to hold that the plaintiff's cause of action is time barred.

**[30]** It is to be noted that the learned JC at paras. [35] and [36] of his judgment found that the plaintiff's claim which was filed on 29 April 2015 had exceeded the stipulated six years period under the Limitation Act 1953 (Act 254). The learned JC was of the view, that notwithstanding the summons in chambers application (encl. 38) by the executor to strike off the first suit, and the dismissal of the plaintiff's application for stay on 8 November 2008, the first suit would have been automatically struck out in any event by virtue of the non-compliance by the plaintiff with the order for SFC to deposit the sum of RM80,000 within the stipulated time. Therefore, according to the learned JC, the cause of action arose instantaneously after these two occasions ie, from 8 November 2008 when the application for stay was dismissed. The stand taken by the defendants is thus the same as that of the learned JC.

**[31]** We had carefully considered the judgment of the learned JC and the submissions, both oral as well as written, of learned counsel for the plaintiff and defendants. However, we respectfully disagreed with the findings of the learned JC on this issue.

**[32]** First, the law on limitation founded on a contract is trite, that it has a lifespan of six years from the date the cause of action accrues. Section 6(1)(a) of the Limitation Act 1953 (Act 254) states:

> 6(1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:
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> (a) actions founded on a contract or on tort;
>
> (b) …
>
> (c) …
>
> (d) …

**[33]** Thus, in our case, when did the cause of action accrue? In the Federal Court's case of *The Great Eastern Life Assurance Co Ltd v. Indra Janardhana Menon* [2005] 4 CLJ 717; [2006] 2 MLJ 209; at p. 724 (CLJ); p. 215 (MLJ) the court held that "a cause of action founded on contract accrues on the date of its breach and that time begins to run from that breach":

> The law on when a cause of action accrues is already well settled and very much entrenched in our jurisprudence which is this. A cause of action founded on contract accrues on the date of its breach and that time begins to run from that breach.

**[34]** In our case, the defendants in their defence pleaded limitation. So the question is, what was the date or when did the defendants breach the contract of retainer?

**[35]** In the case of *Muhamad Solleh Saarani & Anor v. Norruhadi Omar & Ors* [2010] 1 LNS 370; [2010] 9 MLJ 603, the court held (at para. 5) that "where the defence of limitation is raised, the burden to prove that the action was commenced within the limitation period shifts to the plaintiff" and "*in negligence actions, since damage is an essential part of the cause of action, the period of limitation runs from the date of the damage and not of the act which causes the damage.*" (emphasis added).

> [5] In the present case, where the defence of limitation is raised, the burden to prove that the action was commenced within the limitation period shifts to the plaintiff (see *Ong Ah Bee v. Hii Chung Siong, Robin* [1364] MD 2; [1993] 1 CLJ 504 at p 505). Under the Limitation Act, the time barred is absolute.
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> **'It has been said that in negligence actions, since damage is an essential part of the cause of action, the period of limitation runs from the date of the damage and not of the act which causes the damage'**, per Steve

Shim J (as he then was) (*Beckhouse v. Bonomi* [1861] 9 HL Cas 503; *Midland Bank Trust Co Ltd & Anor v. Hett, Stubbs & Kemp (a firm)* [1978] 3 All ER 571).

In *Cartledge v. E Jopling & Sons Ltd* [1963] 1 All ER 341, Lord Pearce said:

I agree that when a defendant raises the statute of limitation the initial onus is on the plaintiff to prove that his cause of action occurred within the statutory period. When, however, a plaintiff has proven an accrual of damage within the six years … the burden passes to the defendants to show that the apparent accrual of a cause of action is misleading and that in reality the cause of action accrued at an earlier date."

(emphasis added)

**[36]** So in the present case, when did the breach occur or specifically when did the damage occur (as opposed to when the act which caused the damage occurred). To answer this, a look at the SFC order which was granted by the Deputy Registrar dated 28 March 2008 is crucial. The SFC order is as follows:

PERINTAH

ATAS PERMOHONAN Defendan dinamakan diatas DAN SETELAH MEMBACA … DAN SETELAH MENDENGAR … MAKA ADALAH DIPERINTAHKAN bahawa Nyo Nyo Aye diperintahkan untuk mendepositkan ke dalam Mahkamah sejumlah wang sebanyak RM80,000.00 sebagai jaminan untuk kos dalam masa empat belas (14) hari dari tarikh Perintah Mahkamah diserah kepada Peguamcara Plaintif **DAN DIPERINTAHKAN** bahawa sementara jumlah jaminan kos tersebut dibayar oleh Nyo Nyo Aye ke dalam Mahkamah ini, tindakan Nyo Nyo Aye untuk menentusahkan kesahihan tandatangan simati dalam wasiat hendaklah digantung sementara dan *sekiranya Nyo Nyo Aye gagal mendepositkan jumlah untuk jaminan kos seperti yang diperintahkan dalam masa yang ditetapkan, tindakan Nyo Nyo Aye seperti dalam Writ Saman bertarikh 6 haribulan Ogos 2007 dan apa-apa tindakan Nyo Nyo Aye untuk menentusahkan tandatangan simati hendaklah dibatalkan* kos permohonan ini dijadikan kos mengikut kausa.

Bertarikh pada 28 haribulan Mac 2008

Puan Siti Noraida Binti Sulaiman

...

Timbalan Pendaftar

Mahkamah Tinggi

Kuala Lumpur

(emphasis added)

**[37]** The phrase used by the Deputy Registrar in the SFC order is that the first suit "hendaklah dibatalkan" if the plaintiff fails to deposit the SFC within the stipulated time.

**[38]** It was the defendants' case that the date of 24 August 2009 which was the date the High Court ordered the first suit to be struck off, was only a confirmation of the failure by the plaintiff to adhere to the SFC order. This is so, since in any event, the first suit was already struck off by virtue of the non-compliance of the SFC order and at that point of time the purported damage had already accrued. The defendants argued that the plaintiff had failed to adhere to the SFC order when the sum of RM80,000 was not deposited into court within the stipulated time, as ordered by the Deputy Registrar, that is, on or before 8 November 2008. Thus the filing of the summons in chambers (encl. 38) by the executor to strike off the first suit was only administrative in nature. The defendants' stand was that the SFC order is a final order explicitly stipulating that the first suit shall be dismissed ("hendaklah dibatalkan") in the event the plaintiff failed to comply with the said SFC order. In other words, non-compliance by the plaintiff renders the first suit to be struck off on 9 November 2008. In such circumstances, the plaintiff's cause of action for breach of agreement (retainer) and negligence would therefore accrue on 9 November 2008 and six years thereon would have expired on 8 November 2014. In filing this present suit on 29 April 2015, the defendants submitted that the plaintiff's action had already been time-barred.

**[39]** It was the plaintiff's case that the cause of action only arose on 24 August 2009, which is when the first suit was struck off by the High Court on the application of the executor (encl. 38). The plaintiff submitted that the SFC order made by the Deputy Registrar on 28 March 2008 in the first suit did not strike off the action/suit because the said Order merely said that the action "hendaklah dibatalkan" which according to the plaintiff's counsel means it ought to be struck off. This was obviously so since the learned Deputy Registrar did not have jurisdiction to issue an order that the first suit will be automatically struck off in the event of non-payment of the SFC. The plaintiff argued that it was for this reason that the summons in chambers application (encl. 38) was subsequently made to the judge by the executor in the first suit to strike off the action and the judge on 24 August 2009, did hear the application and strike off the suit. The plaintiff further submitted that the defendants, as solicitors who represented the plaintiff in the first suit, did not argue on behalf of the plaintiff, when the application to strike off the first suit was heard before the judge that the said application was unnecessary as the first suit had been automatically/instantaneously struck off in any event when there was a failure or non-compliance to pay the SFC by the plaintiff. In other words, the plaintiff argued that the defendants had accepted the fact that the application to strike off the first suit was necessary and is now estopped from singing a different tune.

**[40]** With all due respect, we are of the view that the learned JC had erred in holding that the cause of action accrued on 9 November 2008 when the application for stay of the SFC order was dismissed by the High Court Judge. We agreed with the defendants' counsel that the SFC order by the Deputy

Registrar which stated that the first suit "hendaklah dibatalkan" means literally that it shall be dismissed (refer to *Istilah Undang-Undang English-Malay/Malay-English* by Rachel Jaques, Syahriman Baharom Shah, Roniha Abdul Rahim and Gavin A Xavier published by Sweet & Maxwell Asia 1998 – Second reprint 2000). Be that as it may, there must be an application by counsel, whether written or oral, for the first suit to be dismissed for non-compliance with the SFC order. Until and unless an application is made in court, or until the Deputy Registrar/judge pronounced the first suit to be struck off, it remains alive. The first suit, cannot on its own, automatically, due to the non-compliance of the plaintiff with the SFC order be struck off.

**[41]** This was the reason why the executor who was the defendant in the first suit No S3-22-890-2007 had made an application by way of summons in chambers (encl. 38) to have the first suit be struck off for non-compliance of the SFC order which application was heard and allowed by the High Court JC on 24 August 2009. The order of the High Court JC dated 24 August 2009 is as follows:

PERINTAH

(Lampiran 38)

ATAS PERMOHONAN Defendan yang dinamakan diatas DAN SETELAH MEMBACA Saman Dalam Kamar yang bertarikh 12 haribulan November 2008, Afidavit Sokongan oleh pihak Defendan yang diikrarkan pada 12 haribulan November 2008, Afidavit Balasan oleh pihak Plaintif yang diikrarkan pada 4 haribulan Disember 2008, Afidavit Tambahan yang diikrarkan oleh En. Kevin Sathiaseelan a/l Ramakrishnan pada 4 haribulan Disember 2008, Afidavit Jawapan oleh pihak Defendan yang diikrarkan pada 16 haribulan Disember 2008, Afidavit Balasan (II) oleh pihak Plaintif yang diikrarkan pada 31 haribulan Disember 2008, Afidavit Jawapan oleh pihak Defendan diikrarkan pada 9 haribulan Januari 2009, Afidavit Balasan oleh pihak Plaintif yang diikrarkan pada 23 haribulan Januari 2009, Afidavit Jawapan oleh pihak Defendan yang diikrarkan pada 4 haribulan Februari 2009, Afidavit Balasan oleh pihak Plaintif yang diikrarkan pada 12 haribulan Februari 2009, Afidavit Jawapan oleh pihak Defendan diikrarkan pada 24 haribulan Februari 2009, Afidavit Balasan oleh pihak Plaintif diikrarkan pada 12 haribulan Mac 2009 dan Afidavit Jawapan oleh pihak Defendan diikrarkan pada 24 haribulan Mac 2009 yang kesemuanya difailkan di sini DAN SETELAH MEMBACA Hujahan Bertulis Peguamcara Defendan bertarikh 4 haribulan Ogos 2009 dan Hujahan Bertulis Peguamcara Plaintif bertarikh 4 haribulan Ogos 2009 dan ditetapkan untuk bicara/keputusan pada hari DAN SETELAH MENDENGAR En. N. Krishna Peguamcara bagi pihak Defendan dan tanpa kehadiran Peguamcara bagi pihak Plaintif MAKA ADALAH DIPERINTAHKAN bahawa lampiran 38 dibenarkan dengan Kos.

Bertarikh pada 24 haribulan Ogos 2009

...
Timbalan Pendaftar
Mahkamah Tinggi
Kuala Lumpur.

**[42]** From the perusal of the above order, Mr Kevin Sathiaseelan a/l Ramakrishnan who represented the plaintiff in the first suit (who is the first defendant in our present case) had filed a number of affidavits in reply affirmed on 4 December 2008, 31 December 2008, 23 January 2009, 12 February 2009 and 12 March 2009 presumably to oppose the application by the executor. Notwithstanding the opposition, the High Court made the order "MAKA ADALAH DIPERINTAHKAN bahawa lampiran 38 dibenarkan dengan kos" meaning allowing the executor's application in encl. 38 to strike off the plaintiff's first suit.

**[43]** The first defendant, Mr Kevin Sathiaseelan a/l Ramakrishnan having acted for the plaintiff Mrs Nyo Nyo Aye in the first suit and having opposed the striking off application filed by the executor to have the first suit struck off, cannot now argue that the striking off order of the High Court dated 24 August 2009 is of no consequence. If that was his stance, he should have argued or taken a stand that the application to strike off the first suit was unnecessary as the said suit would have been automatically struck off in any event when there was a failure by the plaintiff to pay or deposit into court the sum of RM80,000 as SFC. In other words, by his conduct as the plaintiff Mrs Nyo Nyo Aye's counsel in opposing the application to strike off the first suit, he had accepted that the said application was necessary. Further, the defendants as solicitors for the appellant obviously did not advise the plaintiff that the application to strike off was unnecessary to extinguish the first suit.

**[44]** Further, we are in agreement with the plaintiff's counsel that as a general rule, the court will not make or grant a useless order. Why should the High Court on 24 August 2009 strike off the first suit if it had already been automatically struck off on 9 November 2008? In this, the case in The High Court in Penang in Originating Summons No. PA-24-NCVC-30-01/2016 (unreported) of *Thameez Nisha Hasseem v. 1) Charijah Bt Ameerdin Mohamed Shariff 2) Maybank Allied Bank Berhad*, which referred to the case of *Pitt And Another v. Holt And Another; Futter And Another v. Futter And Others* [2013] 3 All ER 429 at p 476; UKSC 26 is illuminating. The case held that the court will not make or grant a useless order.

> It is an old maxim that equity does not act in vain. To my mind that is good law and the court should not make orders which would be ineffective to achieve what they set out to do.

**[45]** As to when the cause of action accrued, as stated earlier, that "in negligence actions, since damage is an essential part of the cause of action, the period of limitation runs from the date of the damage and not of the act which causes the damage" *Muhamad Solleh Saarani (supra)* referred. In this context, the act which causes the damage is the non-compliance by the plaintiff of the SFC order, ie, the failure to pay or deposit into court the sum of RM80,000. But the date of damage only commenced when the plaintiff Mrs Nyo Nyo Aye's first suit was struck off by the High Court on 24 August

2009. Thus the cause of action accrued on 24 August 2009 and would have expired six years therefrom which is on 23 August 2015. Since the present professional negligence suit was filed by the plaintiff against the defendants on 29 April 2015, the plaintiff was well within the six years' time limit. As such, the plaintiff's claim against the defendants is not barred by limitation.

*Breach Of Agreement (Retainer) And Negligence*

**[46]** On the issue of negligence, the plaintiff argued that the defendants were in breach of the agreement (retainer) and negligent in failing to inform and advise her that the first suit would be struck off if she failed to deposit the SFC. Further, the defendants were negligent in failing to secure an application for an extension of time for her to comply with the SFC order.

**[47]** The defendants responded by arguing that they had informed and advised the plaintiff and that the plaintiff's failure to comply with the SFC order was not due to their negligence but instead due to the financial difficulties faced by the plaintiff herself. The defendants contended that the plaintiff had no reasonable prospect of success in the first suit that was struck off. Further, the plaintiff had failed to call any expert to establish the standard of care which had allegedly been breached by the defendants before the defendants were required to call witnesses to rebut the same. As such, the defendants submitted that the learned JC was plainly wrong in holding that the defendants were in breach of agreement (retainer) and negligent since the learned JC had not considered all these factors before coming to his conclusion.

*Whether The Defendants Had Informed And Advised The Plaintiff On The Consequence Of Non-compliance Of Payment Of The SFC*

**[48]** Upon perusal of the GOJ, it is our considered view that the learned JC's findings were correct as it was premised on the facts presented before him. The learned JC had meticulously examined and scrutinised the testimony of the witnesses before coming to his findings. With regard to the allegation that the defendants had not informed and advised the plaintiff on the consequence of non-compliance of payment of the SFC, the learned JC at para. 29 stated as follows:

> [29] ...
>
> (ii) ...
>
> **Based on the testimony of the plaintiff (PW-1), she was never informed nor advised that she had to pay deposit** the sum of RM80,000.00 immediately after the application for stay was dismissed. In support of this fact, evidence was led to show that the plaintiff had duly deposited the sum of RM80,000.00 towards security for cost to the second defendant's client account on 20 November 2008. **This payment was accepted by the defendants without any caveat on the lateness of the payment**.
>
> ...

A Despite the fact that it was the defendants' case that the plaintiff was fully aware of the deadline to comply with the Order for Security For Cost and also the court dates relating to the Stay Application and had consistently advised the plaintiff to prepare the sum of RM80,000.00 in the event the Stay Application was dismissed, the only evidence adduced to this effect was the oral testimony of the first defendant that he had duly informed
B the plaintiff of the actual date of payment. *There was no other evidence to show that the defendants had informed or advised the plaintiff of such. In fact, during his testimony DW-1 repeatedly said that he never informed the plaintiff that she had 1 day left to make payment, the reason being she knew all along when she had to pay the sum ordered as security for cost* (see pages 33, 61 and 67 NOP dated 3.05.2017).

C

*Being professionals, it would be reasonable to expect a legal firm to have at least issued correspondences in writing to the plaintiff on a matter of such great importance*. Whilst evidence was indeed led to show that the plaintiff later on had moved out from her family home due to action by the family of her late husband, it would have been reasonable to still issue letters to the plaintiff
D for her collection as she did present herself at the second defendant firm from time to time. Minutes of meetings between the plaintiff and the first defendant were also non-existent.

In so far as the so called contempt proceeding is concerned, I fail to see how a striking out application can be seen as committal proceedings. If it
E was a committal proceeding, then the plaintiff's suit should not have been struck out. In any event, this fact was never pleaded in the Defence.

*As there is nothing to show that the defendants had given notice to the plaintiff that the payment made by her was late, I have no alternative but to choose the plaintiff's version on this issue.*

F (ix) ...

*Based on the evidence before me, it was apparent that apart from the cause papers being filed for purposes of the stay, there was no documentary evidence nor independent evidence to show that the first defendant had rendered such advice to the plaintiff.*

G Hence, I am constraint to hold that the first defendant was negligent and/or in breach of the retainer when he failed to advise the plaintiff diligently on the importance and/or the need for actions to be taken.

(emphasis added)

H **[49]** It is pertinent to note from the above para. 29 in the GOJ that the learned JC had made a finding of fact that the first defendant had not informed the plaintiff of the consequence of the non-payment of the SFC. This is so since the first defendant (DW1) in his testimony had repeatedly said that he had never informed the plaintiff that she had one day left to make payment and that the reason the first defendant gave for this failure to inform,
I was due to the fact that the plaintiff had known all along when she had to pay the sum ordered as SFC. The learned JC held that there was no documentary evidence, nor independent evidence, to show that the first

defendant had rendered such advice to the plaintiff and that the defendants "being professionals, it would be reasonable to expect a legal firm to have at least issued correspondences in writing to the plaintiff on a matter of such great importance." Then the learned JC went further to state that after accepting the SFC payment of RM80,000 from the plaintiff on 20 November 2008, the defendants could not show that they had given notice to the plaintiff that the payment for the SFC was made late and that in such circumstances, the learned JC held that "I have no alternative but to choose the plaintiff's version on this issue" since "Based on the evidence before me, it was apparent that apart from the cause papers being filed for purposes of the stay, there was no documentary evidence nor independent evidence to show that the first defendant had rendered such advice to the plaintiff."

**[50]** To substantiate why he elected to accept the plaintiff's version, the learned JC had correctly considered and adopted the case of *Noorianti Zainol Abidin & Ors v. Tang Lei Nge* [1990] 1 CLJ 943; [1990] 2 CLJ (Rep) 545, where the court held that when confronted with a situation where there were conflicting versions, then the trial judge should approach the case on the basis of which version was inherently probable or improbable, and if all things being equal, it is trite law that if the version of one of the parties is inherently probable, then the judge has no choice but to accept that version forthwith.

> the trial judge should not approach the case on the basis of deciding which story out of the conflicting stories that should be believed, but rather to consider which version was inherently probable or improbable. All things being equal, it is trite law that if the version of one of the parties is inherently probable, then the judge has no choice but to accept that version forthwith.

*There Was No Reasonable Prospect Of Success In The First Suit*

**[51]** The defendants contended that there is no loss suffered by the plaintiff when the first suit was struck off since the plaintiff had no reasonable prospect of success in the said suit. The defendants argued that the plaintiff's claim that her husband's will was forged cannot be supported by the report of the handwriting expert, Mr Harcharan Singh, dated 20 July 2009, since the report had a neutral conclusion. Then there was the testimony of the officer from Jabatan Kimia Malaysia who prepared both P3 and P4, Puan Nur Ikadewi Sarimin (SP2), who was called by the plaintiff to testify during the course of the trial who had agreed in cross-examination that her conclusion as to whether the will was forged, based on a nine-point scale used in concluding opinions, was the lowest in scale for it to be a forgery. Further, the relationship between the plaintiff and the deceased husband was estranged. Based on these factors, the defendants submitted that the plaintiff's case has no reasonable prospect of success. The Court of Appeal's case of *Pang Yeow Chow v. Advance Specialist Treatment Engineering Sdn Bhd* [2014] 8 CLJ 188; [2015] 1 MLJ 490, which held that if there is a "loss of chance"

A to sue, there will not be any liability if there is no actual loss and/or reasonable prospect of the case succeeding at trial, was relied upon to support its contention.

**[52]** Upon perusal of the GOJ, at para. 30, the learned JC had extensively addressed this issue as follows:

B

> (ii) Whether the plaintiff's prospect of success was weak and the loss and damages suffered by the plaintiff was speculative and not foreseeable?
>
> Answer:
>
> **With reference to this issue, the first defendant gave evidence that the**
> C **plaintiff had a really vague case or a very vague prospect of success** (see beginning pages 49-55 of the NOP dated 3 May 2017). This was after the first defendant read the report of the document examiner, Mr. Hacharan Singh's report on whether the signature in the will of the plaintiff's husband was forged or genuine. According to the first defendant, as the report did not conclude the signature in question is
> D forged or genuine, that dealt a crucial blow to the plaintiff's action against the late husband's family. According to the first defendant, there are no other circumstances to establish that the will is a false document (see page 52).
>
> *Contrary to the first defendant's view that the plaintiff's prospect was weak, the*
> E *plaintiff's learned counsel successfully pointed out that there were a number of factors that he could rely upon to show that the signature of the plaintiff's late husband was forged*. The series of questions from the plaintiff's learned counsel can be seen at pages 52 to 58 of the NOP dated 3.05.2017.
>
> **The issues raised by the plaintiff's counsel can be summarised as follows**:
>
> F (i) The first defendant did not contact the legal firm of Meera & Amereson who purportedly had the plaintiff's late husband's will in their possession.
>
> This was despite the plaintiff and her late husband living in Kuala Lumpur whilst the legal firm was based in Penang.
>
> G (ii) The will concerned was discovered after an advertisement was placed in the newspaper by the plaintiff's late husband's family with no reference number, passport number and IC of the late Rex De Alwis.
>
> (iii) The person who drafted the will did not know that a foreigner
> H cannot own property in Myanmar, a fact which is known to Rex De Alwis.
>
> (iv) The first defendant did not even call the person who witnessed the signature of the late Rex De Alwis namely Vasantha s/o Amarasegaran to find out if he did attest to the will being executed.
>
> I *Still on the same issue, SP-2, Puan Nur Ikadewi via her report (exhibit P-3) had given opinion the signature in question may not have been written by the writer of the specimens. The defendants did not call any expert to counter PW2's report.*

*Considering the issues raised by the plaintiff's counsel together with the report by SP-2, I can only conclude that the first defendant's view is rather weakly substantiated compared to that of the plaintiff. In this regard, it is my finding that the plaintiff's prospect was not weak, speculative nor not foreseeable. Based on the principles propounded in Harrison v. Bloom Camulin (supra), the plaintiff's claim in the Civil Suit was not in the category of a "nuisance claim" and had an appreciable chance to win.*

(emphasis added)

**[53]** From para. 30 in the GOJ above, the learned JC, with regard to the genuineness of the signature on the will of the plaintiff's late husband, had considered the evidence of SP2 (Puan Nur lkadewi), who is a document examiner with the Chemistry Department of Malaysia, who had given evidence that the signature in question may not have been written by the writer of the specimens. The learned JC pointed out that the defendants did not call any expert to counter the report made by SP2. The learned JC also found that although the report of Mr Harcharan Singh is not conclusive that the signature on the will was forged, this was not fatal as the plaintiff could rely on four other factors raised by the plaintiff's counsel and listed above from (i) to (iv) at para. 30 of the GOJ to establish that the will was a false document. His Lordship then concluded that the plaintiff had a reasonable cause of action and "had an appreciable chance to win" against the executor of her late husband's estate in the first suit since he found that "contrary to the first defendant's view that the plaintiff's prospect was weak, the plaintiff's learned counsel successfully pointed out that there were a number of factors that he could rely upon to show that the signature of the plaintiff's late husband was forged." The learned JC then held that "Considering the issues raised by the plaintiff's counsel together with the report by SP-2, I can only conclude that the first defendant's view is rather weakly substantiated compared to that of the plaintiff. In this regard, it is my finding that the plaintiff's prospect was not weak, speculative nor not foreseeable. Based on the principles propounded in *Harrison v. Bloom Camulin* (*supra*), the plaintiff's claim in the civil suit was not in the category of a "nuisance claim" and had an appreciable chance to win.

**[54]** Further, on this point, the plaintiff's counsel submitted to us that the defendants who represented the plaintiff in the first suit should not have taken up the case against the executor if they had felt that there is no prospect of success of winning the case. We are in agreement with this argument. A lawyer should not have taken up a weak and hopeless case to court knowing that there is no prospect of success. This is unethical. A lawyer should only bring a case to court if they feel that they have a fairly good chance of winning. If the case is weak and hopeless, with no prospect of winning, it is incumbent upon the lawyer to advise the client, and to only proceed to file a case in court, despite the advice given, upon instruction of the client. Preferably, in such a situation, the advice by the lawyer should be in writing

and the instruction to proceed by the client too, despite the advice given that the case is weak and hopeless, should also be in writing. Otherwise, as in this instant case, whereupon being sued for professional negligence, it is absurd to turn the table against the client by arguing that the case was weak and hopeless with no chance of winning. In such circumstances, the question that begged to be answered is, did the lawyer in the first place advice the client on the prospect of the case, and if he did, was the advice ignored. Otherwise, without any evidence that such an advice was proffered, the reasonable inference would be that, the lawyer in putting up such a defence is trying to save himself from a professional negligent suit which was of his own making in the first place.

*The Plaintiff's Failure To Establish The Standard Of Care Which Had Been Breached By The Defendants*

**[55]** The defendants submitted that in a professional negligence case, the plaintiff is required to establish that there is a duty of care, that duty of care was breached and damages ensued from the breach. The defendants argued that the plaintiff is required to establish the standard of care expected or required of a reasonable practitioner in that particular area of practice in litigation. This, the plaintiff failed to do and the learned judge was plainly wrong in finding the defendants negligent when no expert was called to give such evidence. This failure to call an expert, the defendants submitted is fatal. In support, the defendants referred to the Court of Appeal cases of *Shearn Delamore & Co v. Sadacharamani Govindasamy* [2017] 2 CLJ 665; [2017] 1 MLJ 486 and *Tetuan Theselim Mohd Sahal & Co & Ors v. Tan Boon Huat & Anor* [2017] 6 CLJ 368.

**[56]** The plaintiff responded by submitting that the standard of care in a professional negligence case is that of the standard expected of another professional in the same profession and cited the cases of the House of Lords in *Arthur JS Hall & Co (a firm) v. Simons*; *Barratt v. Ansell (trading as Woolf Seddon (a firm))*; *Harris v. Scholfield Roberts & Hill (a firm)* [2000] 3 All ER 673 in support.

**[57]** In the case of *Shearn Delamore* (*supra*), it involves an appeal which arose from the decision of the High Court Judge which held that the appellant as a professional firm of advocates and solicitors was liable in negligence in respect of an opinion given by the appellant relating to intellectual property rights to the respondent. The Court of Appeal there held that experts or professionals are required to be called to give evidence on the standard of care expected of a reasonable practitioner in that profession and in a professional negligence case, the burden is on the plaintiff to establish that the standard of care has been breached before the defendant is required to call his witness to rebut the same.

**[58]** In the case of *Tetuan Theselim Mohd Sahal* (*supra*), it involves an appeal which arose from the decision of the High Court which held the appellant was negligent as solicitors in the preparation of a sale and purchase agreement (SPA) for a purchase of a property by the respondent. The Court of Appeal held that evidence had to be called to establish the standard of care expected from a competent solicitor in conveyancing practice to determine whether the appellant had breached that standard of care.

**[59]** In the case of *Arthur J S Hall & Co* (*supra*), as stated earlier, the standard of care in a professional negligence case is that of the standard expected of another professional in the same profession. Lord Steyn in his judgment referred to the observation made by Lord Diplock about a barrister's overriding duty to the court as follows:

> ... No matter what profession it may be, the common law does not impose on those who practice it any liability for damage resulting from what in the result turns out to have been errors of judgment, **unless the error was such as no reasonably well informed and competent member of that profession could have made** ...

Whereas Lord Hobhouse of Woodborough opines as follows:

> **The standard of care to be applied in negligence actions** against an advocate is the same as that applicable to any other skilled professional who has to work in an environment where decisions and exercises of judgment have to be made in often difficult and time constrained circumstances. **It requires a plaintiff to show that the error was one which no reasonably competent member of the relevant profession would have made**.
>
> (emphasis added)

**[60]** From the cases cited above, the standard of care practiced by the defendants must be of the same standard of reasonably competent solicitors in the same area of practice. Thus, the pertinent question that needed to be asked here is, whether the acts and omission that were listed by the learned JC as amounting to negligence and breach of retainer on the part of the defendants were acts or omission which no reasonably well informed and competent member of the Bar would have made. In other words, would another lawyer who has taken up the same brief as the defendants have done or taken those actions which the defendants had failed or omitted to do?

**[61]** On perusal of the GOJ, this issue on the standard of care was considered thoroughly by the learned JC at para. 29, where after going through the omissions of the defendants in failing to inform and advise the plaintiff on the consequence of non-payment of the SFC within time, and when the first defendant was challenged to show proof that he had done so by documentary evidence, and failing to do so, the learned JC held as follows:

A

> Being professionals, it would be reasonable to expect a legal firm to have at least issued correspondences in writing to the plaintiff on a matter of such great importance.

**[62]** Further, at para. 29 (iv), the learned JC held that the defendants were negligent in not filing for an extension of time from the court on an urgent
B basis to enable the plaintiff to pay the SFC after the stay of proceedings application was dismissed. The learned JC also found at para. (ix) that the first defendant was negligent and/or in breach of the retainer when he failed to advise the plaintiff diligently on the importance and/or the need for actions to be taken as follows:

C

> Based on the evidence before me, it was apparent that apart from the cause papers being filed for purposes of the stay, there was no documentary evidence nor independent evidence to show that the first defendant had rendered such advice to the plaintiff.

**[63]** And, having gone through the acts or omissions of negligence, the
D learned JC concluded as follows:

> Hence, I am constraint to hold that the first defendant was negligent and/or in breach of the retainer when he failed to advise the plaintiff diligently on the importance and/or the need for actions to be taken.

E **[64]** On the need to call expert evidence, we are of the view that in our instant case the fact that no expert was called to give evidence on the standard of care, is not fatal. The case of *Shearn Delamore* and *Tetuan Theselim Mohd Sahal* have to be distinguished. *Tetuan Shearn Delamore* (*supra*) it is a case on intellectual property and the case of *Tetuan Theselim Mohd Sahal* (*supra*) involves an SPA. Both these cases on intellectual property and conveyancing
F require an expert to be called to establish the standard of care required or expected from competent practitioners practicing in those specialised fields to establish whether the standard of care has been breached. In our instant case, it is a simple case. It pertains to the duty of a practitioner to inform and advise the client of the consequence of non-payment of SFC which would
G result in the case being struck off. It involves the duty of the practitioner to be diligent, to ask for an extension of time if time has expired and foremost to inform the client on the prospect of success of the client's case and not lead the client on and when the case got struck off to turn the table against the client by alleging that the case has no prospect or chances of winning after
H all. We found the learned JC had extensively delved into the facts of the case before His Lordship made his findings that the defendants are negligent and in breach of their retainer. The learned JC also found the defendants' version improbable as against the plaintiff's version which is probable since the defendants, as professionals, have not kept any records of correspondences
I of their communication with the plaintiff on matters of great importance. In such circumstances, we are of the considered view that the learned JC's findings are correct and therefore do not warrant our appellate intervention.

## Conclusion

**[65]** In the circumstances, and for the reasons we have provided, we allowed the appeal by the plaintiff (Appeal No 12) on the issue of limitation. The plaintiff's cause of action is filed within time and is not time-barred. The order of the High Court on this issue dated 29 November 2017 is thereby set aside. However, the appeal by the defendants (Appeal No 2614) on the issue of negligence and breach of retainer is dismissed. The decision of the High Court that the defendants are negligent and in breach of their retainer and the order of the High Court on this issue dated 29 November 2017 is affirmed. We made a further order that the SFC in the sum of RM80,000 paid by the plaintiff in the High Court be refunded to the plaintiff. Agreed costs at RM15,000 is awarded to the plaintiff, subject to the payment of allocator. The case is consequently remitted to the High Court for the assessment of damages.